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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 366 (LGS)

5 STEPHEN M. CALK,

6 Defendant.

Oral Argument on  
Motions *in Limine*  
(Via Teleconference)

7 -----x  
8  
9 January 26, 2021  
2:02 p.m.

10 Before:

11 HON. LORNA G. SCHOFIELD,

12 District Judge

13  
14 APPEARANCES

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L1Q1CALA

(Case called)

THE DEPUTY CLERK: The parties' appearances have been noted for the record.

Before we begin, I'd like to remind the parties and the press and anyone else observing this proceeding that recording or rebroadcasting of this proceeding is prohibited. Violation of this prohibition may result in sanctions.

I'm also going to ask counsel to please state your name before you speak each time you speak, as we have a court reporter present.

We're here before the Honorable Lorna G. Schofield.

THE COURT: Hello, everybody. Thank you for convening here remotely.

I just want to, as a preliminary matter, confirm with Mr. Calk that he agrees to our proceeding in this way and not in person.

THE DEFENDANT: Yes, ma'am, I do. Thank you.

THE COURT: Okay. And I'll just say for the record that the reason we are proceeding remotely is of course because we are still in the midst of a pandemic. The pandemic has required us to postpone the trial yet again. And there are matters, though, that we need to get in order so that we can be ready to try the case as soon as we're able to do that, and that includes the motions *in limine* concerning the parties' proposed expert witnesses, and that is the purpose of our

L1Q1CALA

1 convening today.

2 So what I propose is, why don't we talk about the  
3 witnesses first, and then let's talk about a trial date, to the  
4 extent it's useful or possible to do that.

5 So as you know, I had asked for us to get together  
6 today so that we could discuss two of the government's proposed  
7 experts -- namely, Mr. Paulson and Ms. Aguirre -- and I don't  
8 intend to have any prolonged discussion of the other proposed  
9 witnesses, the two other government witnesses or the defense  
10 proposed witness. And I've reviewed your papers, and my plan  
11 is to rule on that soon, together with the two witnesses we're  
12 talking about today.

13 So just to get us on the same page, I think everybody  
14 agrees -- it's one of the few things we all agree on -- that  
15 the main factual issue in the case is whether or not the  
16 defendant, Mr. Calk, acted corruptly in connection with the  
17 Manafort loans, and so all of the expert testimony that's being  
18 proffered is intended to go to that issue. And one of the  
19 things that has been sort of in the air in our discussions up  
20 to now is the issue of the quality of the loans. I think we,  
21 again, all agree that whether the loans were good or bad is not  
22 dispositive of the issue of whether or not Mr. Calk acted  
23 corruptly. I'm not entirely sure, but I think we all agree  
24 that everybody believes that the quality of the loans can be  
25 probative of the issue of whether he acted corruptly. In other

L1Q1CALA

1 words, if they were terrible loans and Mr. Calk knew that and  
2 pushed them forward anyway, one might argue that that is at  
3 least circumstantial evidence of corrupt intent; on the other  
4 hand -- and I know this is somewhat contrary to the  
5 government's argument -- the opposite might be said, that if he  
6 thought that they were good loans and that they would benefit  
7 or be profitable to the bank and pushed them forward, that that  
8 would also be probative of Mr. Calk's state of mind.

9 But the reason I'm bringing all this up now is because  
10 the picture I'm getting from reading the parties' papers --  
11 and, you know, they reflect an evolution in thinking, I think,  
12 on both sides -- is of a dog chasing its tail, and the reason I  
13 say that is because everybody seems to be saying, well, we  
14 don't want to get into that issue unless the other side gets  
15 into it. And so the government is saying, you know, we're  
16 going to put forward our witnesses, but they're not going to  
17 talk about the quality of the loans unless the defendant opens  
18 the door to that issue. And the defendant says, well, we have  
19 this expert witness and he can talk about the quality of the  
20 loans, but we're not going to talk about that unless the  
21 government's witnesses are permitted to testify, I presume  
22 including on the quality of the loans. And to some extent, you  
23 know, I think it's maybe a strategic question of both sides  
24 saying who's going to go first with this issue, but unless we  
25 have some sort of common understanding of whether this issue is

L1Q1CALA

1 in the case or not, you know, it's hard for me to rule, it's  
2 hard for you to plan, so what I'm hoping is that you'll both  
3 tell me a little bit about your current thinking, having read  
4 the other side's papers, about what your plan is on that issue,  
5 both in your case in chief and in response to the other side's  
6 case. And of course I'm mindful that the defendant doesn't  
7 have to put on a case, he doesn't have to do anything at a  
8 criminal trial, but why don't we have a discussion anyway.

9 So why don't I start with the government. Who's  
10 speaking for the government?

11 MR. MONTELEONI: Good afternoon, your Honor. Paul  
12 Monteleoni for the government. With me on the line, as I think  
13 has been noted, are my colleagues Hagan Scotten and Benet  
14 Kearney.

15 Yes. I think that it's hard for us to envision a  
16 world in which the quality of the loans is just not an issue in  
17 the case in any way. I think that that seems very unlikely to  
18 happen, both because of some aspect of the way that the  
19 government is planning to put in its case, which I'll talk  
20 about in a moment, then also, you know, I think it's been  
21 raised by defense in a number of ways in which I would just be  
22 very surprised if they sort of didn't raise it themselves. But  
23 I think the way that we can really speak to is that, you know,  
24 there's a number of emails that reflect, and then there's going  
25 to be a bunch of testimony from the bank personnel who were

L1Q1CALA

1 working on the loan that will reflect, that a large number of  
2 bank personnel, basically, you know, the people working on the  
3 loan, believed that these were bad loans. There was, you  
4 know -- I think that a little bit of that discussion came  
5 before you in connection with the suppression motion. We  
6 attached some emails that sort of more relate to portions that  
7 were, you know, shown to Mr. Calk, but beyond the emails that  
8 went to Mr. Calk, it would be almost impossible to present the  
9 story of the loans at the bank without presenting the fact that  
10 they were, and were perceived to be by the bank personnel, very  
11 risky, problematic loans and that most of the people working on  
12 the loans believed would not have been extended if it were any  
13 borrower other than Mr. Manafort but were going to be extended  
14 sort of no matter what the problems were with the loans because  
15 of Mr. Calk. I think that those sort of percipient witnesses  
16 and the documents that in their motion the defense says, well,  
17 the government should prove its case with those, those are  
18 going to describe that these loans were sort of known to the  
19 people working on them to have big problems with it. I think  
20 that the issue is whether, you know -- the sort of more detail  
21 on that besides the documents telling their story and the bank  
22 personnel who worked on the loans telling their story is going  
23 to depend a little bit on to what extent the defense is going  
24 to try to argue at trial, you know, as they have in the  
25 pretrial proceedings, actually, these were good loans or maybe

L1Q1CALA

1 they may not have been good loans but Mr. Calk believed they  
2 were good loans. You know, in that case I think that our view  
3 is that we would need to, you know, provide the sort of  
4 authoritative rebuttal that they were in fact not. But if the  
5 defense didn't really join that issue, then I could imagine  
6 keeping it just to the witnesses who worked on the loans and  
7 their documents. But those will tell a story which will -- is  
8 not necessarily a story of the ultimate, like, credit rating of  
9 the loans, authoritatively determined by the OCC, but is  
10 definitely a story of the loans being perceived by everyone in  
11 the bank as extremely risky and problematic and, you know, and  
12 Mr. Calk being presented with a number of red flags of that.

13 THE COURT: Okay. Could I hear from the defense.

14 MR. LaVERNE: Yes, your Honor. And this is Darren  
15 LaVerne. I'll be speaking for Mr. Calk on this issue.

16 I think your Honor framed the issue correctly. I  
17 would amend it slightly to say I think the issue of the quality  
18 of the loans, or more particularly what Mr. Calk believed about  
19 the quality of the loans, goes not just to whether or not he  
20 acted corruptly but whether or not he intended to be influenced  
21 by what the government characterizes as Manafort's offer of  
22 assistance. And I think the defense's position is that will  
23 certainly be a critical issue at trial. I think we are well  
24 within our rights and intend to put on a defense that Mr. Calk  
25 had a very good reason for acting as a member of the loan

L1Q1CALA

1 committee, along with the other two members, in approving these  
2 loans; that is, that he believed them to be sound loans that  
3 were in fact beneficial for the bank. I expect Mr. Monteleoni  
4 characterized some of the evidence, the factual evidence,  
5 contemporaneous factual evidence, in a certain way. We will  
6 dispute that hotly, I expect, at trial, and the jury will make  
7 its decision.

8 I think where we part ways with the government is the  
9 role and the necessity for experts in this case. And in case  
10 it wasn't clear from our papers, while we have noticed an  
11 expert as a rebuttal witness, we are perfectly content to try  
12 this case without experts based simply on the contemporaneous  
13 factual record, which includes thousands of emails from which  
14 the jury can draw inferences about Mr. Calk's intent, many of  
15 which the government has marked as exhibits in this case; a  
16 number of bank witnesses, who the government has now included  
17 in their witness list, which includes the lead underwriter at  
18 the bank, who worked on these loans, the bank's president  
19 Mr. Ubarri, who was another member of the loan committee, who  
20 approved these loans along with Mr. Calk, in addition to  
21 numerous other loan personnel and bank directors. And  
22 injecting experts into this case, it's the defense's position,  
23 is going to complicate matters, confuse the jury, particularly  
24 where the experts are testifying about matters that clearly  
25 were not known to Mr. Calk at the time, the relevant time,



L1Q1CALA

1 which is the fall of 2016 and January of 2017. And, you know,  
2 just to bring us I guess back to the two witnesses, the two OCC  
3 witnesses that the government has noticed here, Ms. Aguirre, as  
4 your Honor knows from reading the papers, was not involved at  
5 all with the bank during the time that the loans were approved  
6 and issued. She came into play many months afterwards, in June  
7 and July of 2017, when she did an analysis of the Manafort  
8 loans. Now her analysis --

9 THE COURT: Well, I'm going to interrupt you there,  
10 because she is explicitly identified as a rebuttal witness, and  
11 what I heard you say is something similar to what I heard the  
12 government say, which is, we may not need to have these  
13 experts, meaning the two experts we're here to talk about  
14 today, and nothing either from Mr. Belanger about the quality  
15 of the loans. Sounds like we need Mr. McCutcheon regardless  
16 because that's a different issue, which is the thing of value  
17 issue. But if everyone is agreed, without any ruling from the  
18 Court, that we don't need to have expert testimony about the  
19 quality of the loans or the credit rating of the loans, and  
20 everyone is content to rely on the contemporaneous factual  
21 evidence, then this is a very short conference. But let me  
22 hear from Mr. Monteleoni.

23 MR. MONTELEONI: Yes, your Honor. I wouldn't exactly  
24 put it that way.

25 So, you know, first of all, our belief is that we

L1Q1CALA

1 certainly recognize that they have opinions and noticed them  
2 and that's why we're having these motions. We don't really  
3 think that the two witnesses at issue here, Mr. Paulson and  
4 Ms. Aguirre, are really experts. We wanted to sort of provide  
5 this in an abundance of caution. The defense hasn't argued in  
6 their papers that there's anything about this that requires  
7 expertise or any issue with their qualifications. They just  
8 sort of said this is sort of extraneous or too much. But I  
9 want to get even a little more granular than that, which is, so  
10 Mr. Paulson is very much a fact witness in that one of the  
11 things he's going to be testifying about is a conversation that  
12 he had with Mr. Calk, where Mr. Calk made a false statement.  
13 But he's also going to be, you know -- what I think we would  
14 like to put on that is in the nature of opinion, but we don't  
15 think really expert, which is evidence of the framework and the  
16 duties that are applicable to bank personnel in Mr. Calk's  
17 position, which, you know, whether or not he went into great  
18 detail or had an expert analysis of the loans is critically  
19 important to allowing the jury to ascertain whether Calk was  
20 acting with corrupt intent. So --

21 THE COURT: So let's stop there for a second, because  
22 I'd like to ask a question about that.

23 So you talked about evidence of the framework, which I  
24 take to mean from your papers the regulatory framework, and the  
25 duties applicable, which I take it is all about Mr. Belanger's

L1Q1CALA

1 testimony, but let's talk about each of those separately, if  
2 that's possible.

3 How is Paulson's testimony about the regulatory  
4 framework relevant, important, and not something that's covered  
5 by Belanger?

6 MR. MONTELEONI: Those are good questions, and we may  
7 not have been as clear in our papers as we could have been. So  
8 I think that the fact that banks operate under a  
9 conservative -- not maximally conservative, but a conservative  
10 regulatory framework, the risk rating system, and the fact  
11 that, you know, collateral alone does not justify the extension  
12 of loans is something that, you know, came up even in our  
13 pretrial suppression motion. It is very natural for the jury  
14 to sort of think, well, if there was collateral, then maybe he  
15 could just charge a high interest rate and kind of, who cares,  
16 it would be consistent with his duties as a bank president to  
17 take this gamble. And, you know, I think that explaining the  
18 sort of overall framework, not with respect to this loan but  
19 that that is not the rules he's operating under, that's not the  
20 rules that Mr. Calk would have been trained on and expected to  
21 know, and his deviation from that is evidence of corrupt  
22 intent. That's one part of it. That has some level of overlap  
23 with Mr. Belanger on the concept of duties --

24 THE COURT: Let me ask you a question about that  
25 before we get to Mr. Belanger. Doesn't that lead us right back

L1Q1CALA

1 to the quality of the loans? I mean, doesn't that just lead to  
2 ultimately saying, you know, you have to look at all these  
3 other factors and then at some point somebody argues or  
4 somebody else introduces evidence and says, these loans were  
5 unsatisfactory because although they were hypothetically well  
6 collateralized and there was a high interest rate, they still  
7 weren't sound loans? I mean, doesn't that just take us right  
8 back to that issue that I thought was not supposed to be the  
9 centerpiece of this?

10 MR. MONTELEONI: Well, we certainly agree that it  
11 shouldn't be the centerpiece, but I think from the government's  
12 perspective, and it sounds like from the defense's perspective,  
13 there is going to be evidence that bears on the quality of the  
14 loans. The question is just what type of evidence, whether  
15 it's going to be an expert analysis and opinion about the  
16 quality of the loans or just sort of factual evidence that  
17 bears on that quality. But what Mr. Paulson would provide  
18 that's important is the context that's necessary for the jury  
19 to assess that factual evidence. The factual evidence is going  
20 to be coming in -- the emails about the steps that they take,  
21 the concerns that people had, people's testimony about the  
22 risks that they saw in the loan. Those are going to be issues  
23 that people will be arguing and I think we'll be placing some  
24 emphasis on for Mr. Calk's intent, and that comes in in a very  
25 different light when the jury understands that this is supposed

L1Q1CALA

1 to be a conservative institution operating in a safe and sound  
2 manner as opposed to, you know, other types of institutions  
3 they might see, might be thinking about, like more speculative  
4 type of institutions that aren't OCC regulated. The same  
5 factual evidence, which is coming in either way, is going to be  
6 seen in a different light, based on, you know, whether the jury  
7 understands the context. And so we think this is very  
8 important.

9 THE COURT: Okay. That's helpful. Thank you. So I  
10 understand that.

11 I interrupted you. You were about to get to Belanger,  
12 so go ahead.

13 MR. MONTELEONI: Right. Well, I guess what I would  
14 say is that, you know, Belanger can speak to a piece of that  
15 from the perspective of a practitioner and the sort of duties  
16 as a practitioner would see them. You know, Mr. Paulson can  
17 speak just to one overlapping piece of that about the duties  
18 with respect to the risk rating of loans. You know, I think  
19 that we wouldn't present duplicative evidence on this issue of  
20 the duties from a risk perspective, but there are reasons -- I  
21 mean, Mr. Paulson is actually extremely senior. He's currently  
22 the acting comptroller of the Currency. So he might be an  
23 appropriately authoritative person to sort of set the stage for  
24 that. Or maybe we would break off that piece and have  
25 Mr. Belanger just address it. We wouldn't have the same person

L1Q1CALA

1 address the issue of duties from a risk perspective twice. But  
2 there's a different part of the duties that Mr. Paulson is best  
3 positioned to talk to, which relates to the insider abuse  
4 regulations. As to that, you know, we explain a lot in our  
5 papers that, you know, the evidence of breach of duty involves  
6 discussion of what those duties are, and, you know, without  
7 going into great detail, the basic fact that the exchange of  
8 loans for things of value -- and the jury's going to get  
9 instructed as to how that applies as to how those elements  
10 apply in the charge -- but the fact that this is a regulatory  
11 priority for the OCC that they attempt to communicate to  
12 bankers and that they put a lot of emphasis on that in their  
13 investigations -- or in their examinations, rather, all goes to  
14 the factual question of, you know, how likely is it that  
15 Mr. Calk was aware of all of this, which, of course, is  
16 extremely relevant to his intent just like, you know, in a case  
17 where someone was making a false statement on a form, whether  
18 the form had a warning that, you know, false statements can be  
19 prosecuted is relevant to the intent, just as to how much  
20 notice did he have, how much was his environment preparing him  
21 and training him to not do exactly what he did here. So that's  
22 something that is --

23 THE COURT: So let me ask a question, just so I'm sure  
24 that I understand. So the reason we're getting into duties,  
25 regardless of whether it's Mr. Paulson talking about duties or

L1Q1CALA

1 Belanger talking about duties, is that your argument is that  
2 there were certain duties that Mr. Calk knew or must have known  
3 about the duties, and the fact that he disregarded those and  
4 breached those duties suggests that he was acting with bad  
5 intent. Is that the argument, basically?

6 MR. MONTELEONI: Yes, your Honor.

7 THE COURT: Okay. And let me just say, before I hear  
8 from the defense, I mean, one of the things, frankly, that  
9 bothered me about these two witnesses from the OCC is that, you  
10 know, just like the prosecutors, to some extent they're wrapped  
11 in the flag, and I don't want the jury to have the impression  
12 that the government's case has the imprimatur of people at the  
13 highest levels in the regulatory agency that are overseeing the  
14 bank, because of course the regulatory issues are separate from  
15 whether someone is criminally liable for his actions. And so  
16 the 403 issues seem to me very real, given who the witnesses  
17 are. I think that's cured, to some extent, by your saying that  
18 Mr. Paulson, for example, will just talk about the regulatory  
19 framework and not apply any of that to the facts of this case,  
20 but it's still a concern of mine.

21 So let me hear from the defense.

22 MR. LaVERNE: Thank you, your Honor. This is Darren  
23 LaVerne again.

24 I think that is an excellent point and really  
25 highlights the issue, particularly with respect to Mr. Paulson,

L1Q1CALA

1 who Mr. Monteleoni noted was -- I think he's now the number two  
2 official at the OCC, so obviously the impact of his words are  
3 significant. On Mr. Paulson, I think it's useful to sort of  
4 separate out two pieces of what I understand to be his proposed  
5 testimony, which, respectfully to Mr. Monteleoni, I think got  
6 sort of mushed together in his recitation. There's the  
7 question of duty, which I think they've also proposed  
8 Mr. Belanger to testify to, but then there's a whole other sort  
9 of section of his testimony, and I'm just reading here from the  
10 government's disclosure letter. They propose that he be able  
11 to testify that, for example: The OCC system of regulation  
12 benefits the entire financial system and, accordingly, the  
13 entire economy. The roles of the OCC in effectively  
14 supervising institutions collectively provide confidence in the  
15 banking system. That's one example. Another is: Insider  
16 abuse creates undue risk and could undermine the public's  
17 confidence in the institution and the banking system. Your  
18 Honor, you know, we would submit, you know, particularly in  
19 light of the concern you just highlighted, that testimony  
20 really has no place in this case. It's completely irrelevant  
21 and, respectfully, you know, just seems designed to inflame the  
22 jury and try to convince them that, you know, reaching a guilty  
23 verdict here somehow has importance to the larger economy. So  
24 we certainly would object to that.

25 On the questions about the risk rating system and the



L1Q1CALA

1 OCC's regulatory structure, that's all irrelevant if  
2 Ms. Aguirre's testimony on risk rating in 2017 -- which, again,  
3 is after the fact and has no bearing on Mr. Calk's intent -- is  
4 not coming into evidence. So I see no relevance there, and  
5 again, I see a very high risk of prejudice, unfair prejudice,  
6 so we object on those grounds.

7 Just to circle back to the question of duty, which the  
8 government again has sort of raised in the context of trying to  
9 establish corrupt intent here, again, I would just note that,  
10 you know, the contemporaneous record -- if the government wants  
11 to put on evidence, for example, that Mr. Calk was aware of  
12 particular facts at the time, for example, I note that the  
13 government marked in their exhibits the bank's conflict of  
14 interest policy. Now we will have a debate, I'm sure, at trial  
15 about whether or not Mr. Calk, you know, violated that policy,  
16 but if part of their theory of the case is that he knowingly  
17 did something that was against the bank's own procedures or  
18 regulations, they can try to draw in the contemporaneous record  
19 to do that. They don't need a paid expert to come in and  
20 explain that concept to the jury -- it's not a particularly  
21 difficult concept -- or read the regulation to the jury. And,  
22 you know, particularly with regard to Mr. Paulson, again, it  
23 gives the imprimatur of something much more significant than it  
24 actually is. So I really do feel like, you know, that  
25 testimony is extraneous, irrelevant, and just risks a great

L1Q1CALA

1 deal of prejudice to Mr. Calk in this case.

2 THE COURT: Okay.

3 MR. MONTELEONI: Your Honor, may I be heard?

4 THE COURT: Yes. Mr. Monteleoni.

5 MR. MONTELEONI: Yes. I apologize. It's  
6 Mr. Monteleoni.

7 So with respect to this issue of, well, talking about  
8 the significance of the regulations, is that, you know,  
9 inflammatory or prejudicial, you know, I think that this might  
10 be something that -- this was never something that we were  
11 intending to really pound the table on or, you know, hit very  
12 heavily. And if that is the issue, I would think that we could  
13 work out ways of sort of presenting the evidence so that it  
14 wasn't unduly emphatic or prejudicial, but I would say that the  
15 fact that these are regulations to which the OCC attaches  
16 importance and that the regulatory scheme attaches importance  
17 to has some significance because, you know, if you imagine that  
18 the regulations that Mr. Calk violated were, like, that he tore  
19 a tag off a mattress when, you know, you're not supposed to  
20 tear a tag off a mattress, or some real obscure or technical  
21 thing that no one really cares about or no one is expected to  
22 know about, that stands in a very different posture to him  
23 violating duties that, you know, the bank regulator gives a lot  
24 of attention to, and I think that the latter fact would be --

25 THE COURT: Why is that fact relevant?

L1Q1CALA

1 MR. MONTELEONI: Well, because the fact that he's  
2 willing to breach important duties that he definitely knows  
3 about as opposed to sort of technical and obscure duties that  
4 maybe he's less likely to know about or maybe he's less likely  
5 to think anyone cares about, you know, really matters. If  
6 there was some evidence that, oh, yeah, that's on the books but  
7 no one cares about that, that never comes up, people don't pay  
8 attention to it, I would imagine that the defense would want to  
9 put that evidence in. And I think that what we envisioned was  
10 just a little bit, you know, on the opposite direction of that,  
11 like, no, these are important rules, they're looked into,  
12 they're things that are, you know, sort of examined at the  
13 periodic exams and that bank officials understand they're going  
14 to be. So not to pound the table or wrap anything in the flag,  
15 but just to sort of explain this isn't some dusty arcana that  
16 maybe doesn't really matter but this is stuff that would be  
17 important, so the jury can draw inferences as to what his  
18 motive really was when he violated them.

19 THE COURT: And then let me get clear on something  
20 else related to Mr. Paulson, and that is, assuming that the  
21 defense either makes argument in their opening or through  
22 cross-examination raises the issue about the quality of the  
23 loans or about the duties that Mr. Paulson would talk about,  
24 would it be then your intent to call Mr. Paulson back in  
25 rebuttal to say, oh, and Mr. Calk violated these duties in the

L1Q1CALA

1 following ways?

2 MR. MONTELEONI: So first of all, I think there's a  
3 real prospect that if the defense is emphasizing any of this,  
4 that they're likely to do it in their opening statement, but  
5 maybe they won't. I think that Mr. Paulson we were never  
6 thinking of as addressing these particular facts of the case.  
7 He didn't himself examine the loan in the way that Ms. Aguirre  
8 did. You know, he had a particular fact interaction with the  
9 defendant, which he has to talk about, but beyond that, his  
10 testimony is going to be about the principles, and whatever  
11 doors the defendant opens, his testimony is going to stay about  
12 the principles. The people who will be sort of offering an  
13 opinion about the loans themselves, either from a regulatory  
14 perspective or from a practitioner perspective, would be  
15 Belanger and/or Aguirre, and again, if that door is opened, we  
16 wouldn't do it in a duplicative way, but, you know, there are  
17 things that each of them bring to the table that the other  
18 doesn't, so it might sort of depend in which way the door is  
19 opened. But we wouldn't anticipate bringing Mr. Paulson back  
20 for specifics about the loans. The only specifics would be  
21 about his fact conversation with Mr. Calk, which we would be  
22 bringing out in the beginning anyway.

23 THE COURT: Okay. So that's --

24 MR. LaVERNE: Your Honor?

25 THE COURT: Yes. Mr. LaVerne?

L1Q1CALA

1 MR. LaVERNE: I'm sorry. It's Darren LaVerne.

2 I just want to make sure it's clear, the defense does  
3 not plan to argue in any way, shape, or form that somehow the  
4 regulations at issue here or the laws are unimportant and seek  
5 some sort of verdict on that basis. I just think it's totally  
6 improper for either side to be putting on that kind of  
7 evidence, and while Mr. Monteleoni was sort of trying to  
8 downplay it and saying they're not going to pound the table, it  
9 just has no place in the case, particularly when we're talking  
10 about the number two official in the OCC coming in to testify  
11 in court.

12 THE COURT: Okay. So let's talk about Ms. Aguirre.  
13 And so it sounds like her testimony really is just geared at  
14 the loan and the downgrading of the loan, and even though she  
15 was there after the fact, my understanding is that she  
16 downgraded it essentially as of the time that it was issued,  
17 and again, my impression is that she was just a rebuttal  
18 witness, but now I'm not so sure, and I'm even more concerned  
19 in some ways about her and her coming in and saying, I speak  
20 for the OCC and these were bad loans, and, you know, anybody  
21 would have known that.

22 So let me hear from Mr. Monteleoni about Ms. Aguirre.

23 MR. MONTELEONI: Well, your Honor, I obviously  
24 certainly apologize for any confusion. There is potential --  
25 we don't view her as really an expert but just someone who sort

L1Q1CALA

1 of observed and reviewed these loans shortly after and then  
2 also observed a sort of telling reaction from the bank  
3 personnel who she communicated these problems to shortly after,  
4 so a little bit of further fact testimony that she may be  
5 offering about the aftermath of them. You know --

6 THE COURT: Say that again. I'm sorry. I didn't  
7 quite understand that. Say that again, or explain what you  
8 mean.

9 MR. MONTELEONI: I apologize.

10 THE COURT: Reaction from bank personnel?

11 MR. MONTELEONI: Yes. So she communicated her  
12 findings to the bank personnel at a meeting, and they reacted  
13 in an atypical way, which I think, you know, the jury will be  
14 able to draw their inferences for, but I think that we think  
15 that sort of their reaction to her explaining that she thought  
16 that the loan -- that she saw these problems with the loan was  
17 sort of evidence that they believed that the loan was  
18 problematic and that they were uncomfortable with it, so it's  
19 sort of circumstantial evidence.

20 THE COURT: And what do you mean they reacted in an  
21 atypical way? Are you talking about statements that  
22 potentially are hearsay or something different?

23 MR. MONTELEONI: Well, sorry. So their lack of  
24 response, that is. She had a type of meeting where, you know,  
25 she has a lot of these meetings, and typically when she sort of

L1Q1CALA

1 sets up the meeting, she says, we're going to discuss this  
2 loan, and that happens for loans the OCC has sort of found  
3 issues with, and so the bank personnel that she meets with,  
4 typically, they're sort of prepared to respond or to argue  
5 about what the problem is with the loan and, you know, so they  
6 all come in sort of loaded for bear, and what happened this  
7 time is when she sort of set up the meeting and showed up that  
8 time, there was just a silent reaction, where no one sort of  
9 said any words to her, and that was, you know, an unusual thing  
10 that we think is going to suggest the defendant's intent. So  
11 we don't think it's really hearsay. But also, I would note  
12 that even if there were a statement to be made, that these were  
13 all employees of the defendant within the scope of their  
14 employment. That's probably an issue that we might raise with  
15 respect to a number of documents, but, you know, we think that  
16 even if they had made statements, those would be admissible  
17 just as sort of fact testimony of what the bank personnel, you  
18 know, believed. But I didn't mean to get too sidetracked about  
19 what she would principally say, which is that I believe that  
20 she would be explaining that the documentation that she  
21 reviewed that were dated from the time that the loans were  
22 originated led her to the conclusion that the loans were of  
23 substandard quality at origination because of Manafort's  
24 insufficient cash flow and that it is very unusual, you know,  
25 in her experience to have to reclassify a loan to substandard

L1Q1CALA

1 at the time of origination.

2 And again, the red flags that we would first be  
3 explaining that Mr. Calk was aware of all go to indications  
4 that he has cash flow problems and that this is sort of the  
5 fruition of a risk that he was aware of, just like in the  
6 *Seabrook* case, the Second Circuit found that the fruition after  
7 a bribe of a risk to a risky investment bore on the defendant's  
8 intent and the defendant was aware of risk. So similarly here,  
9 Mr. Calk is aware of risk. The evidence of their fruition  
10 would, you know, be relevant for the same reasons that it was  
11 in that case, which we cite in our memo of law.

12 With respect to the prejudice --

13 THE COURT: Wait, wait. Let me ask this question too.  
14 I mean, I asked it about Mr. Paulson. I understand that  
15 Mr. Belanger is at least prepared to testify about the  
16 soundness of the loan, and it sounds as though it is the same,  
17 but potentially less prejudicial. I know you were going to get  
18 to the issue of prejudice. So why not just rely on  
19 Mr. Belanger so we don't have that issue?

20 MR. MONTELEONI: If your Honor feels that we should be  
21 responding to it only with Mr. Belanger, if at all, then we  
22 would abide by the Court's ruling on that. The fact that she  
23 did this in the ordinary course of her job responsibilities,  
24 not as a paid expert for us and, you know, and we think not  
25 really as an expert, just as a trained sort of layperson, I



L1Q1CALA

1 think makes her testimony comprehensible and makes it credible.  
2 We don't think that -- I mean, we think that that's sort of the  
3 good kind of prejudice in that she doesn't have an arguable  
4 motive to shade things. I mean, I think that we could  
5 potentially address issues that, you know, just her being a  
6 government official, you know, gives too much of an imprimatur  
7 with an appropriate limiting instruction. We certainly expect  
8 that the jury would be informed that any of these regulatory  
9 issues or regulatory violations are not themselves bases for  
10 criminal liability, just as this type of evidence is admitted  
11 in the *Gross* case or in the *McElroy* case with these  
12 instructions; you know, we think that that satisfies prejudice.  
13 Of course if your Honor feels that that just can't be done, you  
14 know, we can offer the testimony of Mr. Belanger. But the fact  
15 that she sort of did this just in the course of her job, not  
16 because we were hiring her, and also because she had this  
17 factual interaction with them in the course of her review  
18 shortly after, we think that she does have something to offer,  
19 and I guess we would request that, you know, if you're inclined  
20 to rule in that direction, you sort of preserve the possibility  
21 of revisiting this if there's an aspect of relevance that we,  
22 you know, really feel like the defense raises and we can best  
23 address through her.

24 THE COURT: Okay. Could I hear from the defense.

25 MR. LaVERNE: Yes. Thank you, your Honor. And this

L1Q1CALA

1 is Darren LaVerne again.

2 Again, I think there were a few things kind of  
3 conflated together there. And the details are actually sort of  
4 important to understand in assessing Ms. Aguirre's testimony.

5 First of all, on the issue of the meeting  
6 Mr. Monteleoni was describing and some supposed nonreaction,  
7 frankly, I have not heard anything about that before from the  
8 government. It was not something covered in their extensive --  
9 otherwise extensive write-up of what Ms. Aguirre's expected  
10 testimony was, so I'm not quite sure what to do with that other  
11 than to say that it sounds, at least right now, like some form  
12 of hearsay, and I expect we'll have a separate debate on that.

13 With respect to the sort of core part of what I  
14 understand to be Ms. Aguirre's proposed testimony, which is the  
15 rating downgrade and her opinion in June and July of 2017 that  
16 these were substandard loans, the key point, your Honor, is  
17 really to understand the basis for that finding. And the basis  
18 for Ms. Aguirre's finding, as she stated in her report, was  
19 that the bank underwriting department was not properly  
20 accounting for noncash items and making accurate adjustments  
21 based on information in tax returns. There is no evidence that  
22 I'm aware of that the government has put forth that Mr. Calk  
23 was aware that the underwriting department was making this sort  
24 of mistake and error in its underwriting analysis, with respect  
25 to Mr. Manafort or anyone else. So her finding in that regard

L1Q1CALA

1 really has no bearing, zero bearing, on what Mr. Calk's intent  
2 was in this case, and that's the key issue, again.

3 Separately, it's clear from Ms. Aguirre's report that  
4 she made that finding -- that is, that the underwriting  
5 department was essentially doing an inaccurate analysis of tax  
6 returns -- she made that finding with respect to four other  
7 loans in addition to the Manafort loan, that had nothing to do  
8 with Mr. Manafort. Apparently what she found was that the  
9 underwriting department, as a sort of, you know, loanwide  
10 problem, was inaccurately accounting for information in tax  
11 returns. So it really, again, is very attenuated when you look  
12 at the details as to the key question, which I think we have to  
13 remain focused on, which is whether or not Mr. Calk intended to  
14 be influenced corruptly here.

15 So this is set out in further detail in our papers,  
16 but I really think it's important to focus on that issue when  
17 we're talking about Ms. Aguirre.

18 THE COURT: Okay.

19 MR. MONTELEONI: May I be heard just briefly on the  
20 last point?

21 THE COURT: Yes. Mr. Monteleoni.

22 MR. MONTELEONI: I apologize for the serial nature.  
23 Just the last issue that Ms. Aguirre's findings, you know, that  
24 there were somewhat related findings for other loans. I think  
25 that there will be plenty of evidence that Mr. Calk's level of

L1Q1CALA

1 personal involvement in these loans in particular was unique  
2 and unusual and changes the significance of the underwriting  
3 because this is something that he should have been aware of.  
4 But, you know, I guess we would just ask, if the issue is that,  
5 you know, Ms. Aguirre, the Court finds, is not the proper  
6 vehicle to put forward any of this, if the door is opened,  
7 that, you know, at least commensurate limits on the ways in  
8 which they could be, you know, impeaching Mr. Belanger if we  
9 have to put in Mr. Belanger, because we don't need  
10 Ms. Aguirre -- if we don't need Ms. Aguirre because, you know,  
11 we have Mr. Belanger, then we would ask that he not be able to  
12 be impeached in the ways that Ms. Aguirre couldn't. But I  
13 mean, we could deal with that down the line.

14 THE COURT: But let me do this, just so that we have  
15 something to show for all of this discussion. With respect to  
16 Ms. Aguirre, I think it is more clear. I would preclude her  
17 testimony about the downgrading of the loans as potentially  
18 confusing to the jury, because my fear is that they would think  
19 that the OCC's finding that the loans were of poor quality at  
20 the outset, even though it was later and for whatever reason it  
21 was, that they would somehow be confused into believing that  
22 because of that downgrading and the official nature of the  
23 downgrading, that it somehow carries more weight and therefore  
24 that she was, again, blessing the government's case and at the  
25 very least blessing their argument about what Mr. Calk should

L1Q1CALA

1 have known and what the quality of the loan was as opposed to  
2 looking at the merits of those arguments. And so I'm going to  
3 preclude her testimony. Of course you can bring out those  
4 issues about the quality of the loan -- not the downgrading but  
5 just the quality of the loans -- through Mr. Belanger, and I'd  
6 ask you to talk to each other to work out the appropriate scope  
7 of cross and impeachment so that the government isn't  
8 prejudiced by my ruling in the way that I have as to  
9 Ms. Aguirre.

10 And then with respect to Mr. Paulson, I will allow the  
11 testimony of Mr. Paulson, understanding that it is providing  
12 background information about the regulatory framework and that  
13 it is not addressed to the particular facts at all, and I would  
14 like the parties to confer about an appropriate limiting  
15 instruction for Mr. Paulson's testimony so that the jury isn't  
16 unduly influenced and understands that it's just background.  
17 And --

18 MR. LaVERNE: Your Honor?

19 THE COURT: Yes.

20 MR. LaVERNE: I'm sorry. It's Darren LaVerne. I just  
21 wanted to clarify --

22 THE COURT: Yes, Mr. LaVerne.

23 MR. LaVERNE: I just wanted to clarify on Mr. Paulson.  
24 Was your Honor precluding testimony about his opinion of the  
25 importance of regulations and the issues at stake here in this

L1Q1CALA

1 case? Leaving aside the regulatory context.

2 THE COURT: Thank you for reminding me. I hadn't  
3 addressed that one way or the other, but it seems to me that  
4 suggesting that this regulatory scheme and therefore the case  
5 are somehow critical to the health and well-being of the  
6 economy is a bit much. My impression also is that the  
7 government doesn't intend to do that. So if you could confer  
8 on that as well and try to come up with something more  
9 concrete, I think everybody understands your concern, and I  
10 agree that that shouldn't be a part of the case. On the other  
11 hand, I understand the government's argument that the  
12 regulations in question are not trivial and therefore Mr. Calk  
13 should have or likely would have known about them. I think  
14 that's something that is appropriate. So if you could try to  
15 work that out. And to the extent you can't work it out, if you  
16 would come back to me with a letter that includes, in a single  
17 letter, sort of your competing proposals, both what you agree  
18 on and what you don't agree on, and then I can resolve whatever  
19 the difference is.

20 MR. LaVERNE: Thank you, your Honor.

21 MR. MONTELEONI: Thank you, your Honor.

22 THE COURT: With respect to Mr. Belanger, as I  
23 understand it, he's now talking about the duties owed by a bank  
24 director and CEO in the defendant's position, both with regard  
25 to regulatory standards and industry practice. My

L1Q1CALA

1 understanding further is that it won't be cumulative of  
2 anything Mr. Paulson says. The trial's going to be long  
3 enough. Please don't put in any cumulative testimony,  
4 particularly by way of background. And so I will allow that.  
5 I would like a joint instruction about his testimony, in  
6 substance, that the defendant is not charged with and can't be  
7 convicted for violating regulatory or legal or industry  
8 standards and that the evidence should be considered, if at  
9 all, only to the extent the jury determines that it bears on  
10 the defendant's state of mind. That's not even a suggestion.  
11 The two of you should come up with something together and then  
12 propose it to me.

13 And also, with respect to those duties, as I  
14 understand it, Mr. Belanger is not supposed to be talking about  
15 the breach of those duties, only that those duties are there,  
16 so the government may present evidence identifying those duties  
17 but should not talk about the consequences of breaching them,  
18 so shouldn't suggest that there was a breach of fiduciary duty  
19 for which there could be civil liability, or of regulatory  
20 duties, the violation of which would result in some penalty.  
21 He should just simply talk about the duties and not the  
22 consequences.

23 And then with respect to the fourth witness,  
24 Mr. McCutcheon, I would allow his testimony. It appears to be  
25 based on his experience, and he appears qualified to give it.

L1Q1CALA

1 And so I will allow that. To the extent there are objections  
2 to the qualifications of any witness -- whether Mr. Carron on  
3 the defense side or Mr. McCutcheon on the government's side --  
4 I think it goes to weight and not admissibility, so I will  
5 allow those witnesses. And I will allow Mr. Carron's testimony  
6 also. I think the objections go to the weight and not  
7 admissibility.

8 As to the other issues, which I think of as the sort  
9 of miscellaneous issues raised by the government, evidence or  
10 argument about the defendant's good acts, or evidence intended  
11 to elicit sympathy, my understanding from the defense is that  
12 they don't intend to offer any such evidence except to the  
13 extent that it's directly relevant to matters in the case. So  
14 for example, his experience in the armed forces as it relates  
15 to the prospect of acting as Secretary of the Army, that would  
16 be admissible.

17 And the argument about the charges being politically  
18 motivated, the defense has said that it doesn't intend to make  
19 any such argument, and therefore that objection or application  
20 on the part of the government is moot.

21 So I think that takes care of the motions *in limine*.  
22 And what we should talk about then is the trial date. And of  
23 course, you know, that requires to some extent a crystal ball,  
24 which I don't have. So --

25 MR. MONTELEONI: Your Honor, might I raise one --



L1Q1CALA

1 THE COURT: Yes. Who is this?

2 MR. MONTELEONI: Paul Monteleoni.

3 THE COURT: Yes, Mr. Monteleoni.

4 MR. MONTELEONI: One aspect of our motion with respect  
5 to Mr. Carron was that if his testimony was to be admitted, as  
6 we understand your Honor has ruled that it is, that a  
7 supplemental disclosure be ordered, at least with respect to  
8 his projections of profit and loss under reasonable  
9 assumptions. We honestly have no idea what those projections  
10 are or whether we agree with them because we don't know what  
11 the assumptions are and what the projections are.

12 THE COURT: Thank you for raising that, because I  
13 wanted to give the defense an opportunity to revise their  
14 disclosure, which is something separate from what you're asking  
15 for at the moment. And the reason I say that is because the  
16 government's disclosures about their witnesses --  
17 understandably this happens in the course of preparing for  
18 trial -- have somewhat evolved from the time they made their  
19 initial disclosures and the defense expert was intended to be a  
20 rebuttal expert, as I understood it, but, you know, to some  
21 extent is rebutting a moving target. So now that it's I think  
22 relatively clear and fixed what the government's case is, to  
23 the extent that the defense wants to supplement its disclosure  
24 to offer new rebuttal opinions to address things that we heard  
25 in the government's papers, responsive papers on the motions in

L1Q1CALA

1     *limine* or in the argument, you can do that. But I'd ask that  
2     you do it in the next, let's say, two weeks, just so it doesn't  
3     get too stale.

4             And then in addition, I had understood that the  
5     defense had intended to make disclosures of the sort that  
6     Mr. Monteleoni was asking for but perhaps not on the timetable,  
7     since the trial has been pushed out, that necessarily makes  
8     sense anymore.

9             So let me hear from Mr. LaVerne. When would you be  
10    prepared to make additional disclosures about the details of  
11    your expert's testimony that have already been disclosed?

12            MR. SCHOEMAN: With respect to Mr. LaVerne, this is  
13    Mr. Schoeman, and I think the division of labor here puts this  
14    one on my court. And --

15            THE COURT: Okay. Mr. Schoeman.

16            MR. SCHOEMAN: Judge, we'd be happy to do as the Court  
17    is directing and within two weeks will, if we have a revised  
18    notice in response to what's transpired, and we'll at that time  
19    also provide the details of the calculations, most of which is  
20    just arithmetic on that particular issue, but we can provide  
21    something in two weeks.

22            THE COURT: Okay. I mean, it matters what it is  
23    you're adding and subtracting, so I'm sure the government would  
24    appreciate that.

25            All right. Let's talk about the trial date. And I'm

L1Q1CALA

1 not even sure how to do this, because of course at the moment  
2 jury trials in the Southern District of New York are at a  
3 standstill, and then once they revive, we will have to make an  
4 application, and although we will be near the front of the  
5 line, all the people who are incarcerated and waiting for trial  
6 will be before us. So what I'm suggesting is that we just pick  
7 a date in the second quarter. I'll apply for it, and we'll  
8 hope for the best. And I don't think we can do more. The  
9 other option is just to say the heck with the second quarter,  
10 maybe everybody's healthy by the third quarter, we just pick a  
11 date and do it, but, you know, of course I don't know that  
12 either.

13 So any thoughts from anyone?

14 MR. SCHOEMAN: Sure. I'll go first. This is  
15 Mr. Schoeman again.

16 So we appreciate the situation we all find ourselves  
17 in, and we wish we had the same crystal ball. And just to be  
18 clear, having done the trial a couple of times, obviously  
19 Mr. Calk continues to want a trial at the soonest opportunity  
20 but also very much feels strongly that the trial that occurs  
21 should include live witnesses as opposed to video witnesses.  
22 And just to be clear with the Court, and I've been clear with  
23 the government, we would prefer a trial -- we would object to a  
24 trial, a sooner trial that had video witnesses and would prefer  
25 a slightly later trial that had live witnesses. But we agree

L1Q1CALA

1 with the Court that how to get there in the current environment  
2 is difficult and it would require seeing into the future. So  
3 we have no problem and would appreciate being put in for a  
4 trial date in the second quarter, but we do want just to be  
5 clear with the Court, that should the issue present itself  
6 again where we would be potentially put to the question of,  
7 would you prefer a trial sooner with video witnesses or  
8 slightly later with live witnesses, our very strong preference,  
9 based on what we perceive to be significant prejudice to the  
10 defendant, would be to have live witnesses.

11 THE COURT: Okay. So --

12 MR. MONTELEONI: And we don't --

13 THE COURT: Go ahead. Mr. Monteleoni?

14 MR. MONTELEONI: Sorry. This is Paul Monteleoni for  
15 the government.

16 We don't object to proceeding in that fashion. I  
17 guess we would just note that the second quarter includes some  
18 dates that are pretty soon and then some dates that are less  
19 soon, and I think in the interest of avoiding sort of serial  
20 adjournments where we're all sort of gearing up for a trial in  
21 short periods of time, I think we would want the date to be  
22 towards the back of the second quarter, maybe, you know, I'd  
23 say, certainly no less than 90 days from now. But other than  
24 that, we have no objection.

25 THE COURT: Okay. What about end of June?

L1Q1CALA

1 MR. MONTELEONI: That's fine for the government.

2 THE COURT: Okay. And Mr. Schoeman?

3 MR. SCHOEMAN: Yes. So I think that that's fine for  
4 the defense. Because we're all in different places, I'm going  
5 to give a few seconds for people to let me know electronically  
6 if middle or end of June is a problem, but assuming -- or they  
7 could speak up on the phone. But I think a date in middle of  
8 June or so would be fine.

9 MR. LaVERNE: This is Darren LaVerne. I think we're  
10 all good on the June date.

11 MR. MARGOLIS: Jeremy Margolis. We're good in June.

12 THE COURT: Okay. Anyone else want to chime in?

13 So let's set it for June 28th, on the theory that  
14 maybe we will have a very good chance by then of actually going  
15 forward and not have to sort of prepare and shut down again.

16 And I'll issue a brief order that summarizes my  
17 rulings on the experts and also a trial scheduling order, and  
18 we'll go from there.

19 Is there anything else we should talk about?

20 MR. MONTELEONI: We would request that time be  
21 excluded in the interest of justice and due to the complexity  
22 of the case, as the last exclusion was done.

23 THE COURT: Okay. Any objection to that?

24 MR. SCHOEMAN: We would consent to the exclusion of  
25 time based on the conditions of the COVID pandemic.

L1Q1CALA

1 THE COURT: Okay. So what I'll do is I will include  
2 in my written order from our conference today a formal  
3 exclusion of time between now and the new trial date, which is  
4 June 28th, based on the current conditions, meaning the  
5 pandemic.

6 All right. I take it there's nothing else. I think  
7 this was productive. Thank you very much. And I'll hear from  
8 you all soon.

9 Thank you. We're adjourned.

10 ALL COUNSEL: Thank you, your Honor.

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